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Access to Information Relating to EU Structural Funds and Implementation System in Czech Republic

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Access to Information

Theory

Although the constitutional principles of the individual Member States of the European Union substantially vary, some common principles may be identified which shape the functioning of the State administration. These principles should constitute important limitations on the activities of the State administration and they should serve to reduce the traditional perception of this institution as a sort of aristocracy. This type of traditional concept of performance of the public administration is clearly obsolete and is being replaced by a model of the public administration as a service for citizens. If possible, all processes in a democratic society should be public, open to external control and transparent and the outputs of these processes should be published. In theory, we speak about the openness, transparency and publicity principles. All these principles together constitute one of the substantial aspects of "good governance" or "good administration".

Openness and transparency also need to be delimited by clearly defined and comprehensible, generally binding and enforceable rules that are not mutually contradictory. Only in exceptional and legitimate cases may some matters be considered to be secret or confidential and thus exempted from the openness and transparency principles. The provisions limiting the right to information must be codified to ensure good orientation in the legal order and to facilitate the interpretation of legal regulations. However, it is rather difficult to achieve a balance between secrecy and disclosure of certain facts and this aspect is frequently discussed in legal theory. The conflict between free access to information and the right to protection of personal data, discussed below, is an example.

The massive use of the Internet and other modern communication technologies has led to a relatively new perception of access to information as defined by the national and European generally binding legal regulations. The right of access to information may be viewed as one of the pillars of "good governance", as it ensures a certain informal supervision over the functioning of the public administration. This is effected either by disclosure of the final information that is available to a public institution or by the possibility of any person to participate as an observer in a meeting, on the basis of which a decision is taken. The possibility of personal participation of individuals – observers – in such meetings or the possibility of subsequently becoming acquainted with the result thereof to some extent ensures that the meeting will comply with the applicable rules and that the presence of non-participating persons not known to the participants will have a favorable influence on the

quality of the participants' activities, as well as their responsible approaches towards the matter in hand.

The utilization of the right of access to information, together with the use of information technologies, leads to a certain change in the relationship between the Government and the citizens. At the present time, citizens may become acquainted with various documents without having to leave their homes and they may also manage their affairs through the Internet, instead of visiting the office during its opening hours. A certain vision of the future can be drawn from the above facts, where the representative form of democracy will be supplemented by the second pillar - direct participation of citizens in the administration of public affairs.

Legislation

In the Czech legislation, the right of access to information is perceived as one of the fundamental political rights and is defined in Art. 17 of the Charter of Fundamental Rights and Freedoms (Act No. 2/1993 Coll.). The fifth paragraph thereof states: "Organs of the State and of local self-government shall provide in an appropriate manner information on their activity. The conditions and the form of implementation of this duty shall be set by law."

This implementing law, Act No. 106/1999 Coll. on free access to information, implements Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information.

The purpose of the Act is stipulated in its Section 1, which states that: "... the Act regulates the terms and conditions of the right to free access to information and defines the basic terms and conditions under which information is provided." The Act does not provide for the functioning of the public administration or describe the processes ensuring transparency and how the Act contributes to democratization of society; it does not even expressly mention the relation to the above-mentioned constitutional principles. Its purpose must be interpreted in the context of paragraph 5 of Art. 17 of the Charter of Fundamental Rights and Freedoms and the obligation of governmental agencies and the territorial self-government bodies to provide reasonable information on their activities stipulated therein.

The bodies that are obliged to provide information relating to their competences pursuant to Section 2 are the following:

- a) governmental agencies,
- b) territorial self-governing bodies,

c) public institutions managing public funds and

d) bodies that have been authorized by the law to decide on the rights, interests protected by law or duties of natural persons and legal entities in the public administration sector, solely within the scope of their decision making.

The right of access to information is limited by another right defined in Art. 10 (3) of the Charter. The provision states that "everyone has the right to protection against unauthorized collection, publication or other misuse of his data."

The right of access to information and the right of protection of personal data should be interpreted complementarily and, in practice, it is necessary to find a certain balance between these rights. Court practice, in particular the jurisprudence of the Constitutional Court, may serve as an important guide in exercising these rights.

The above-mentioned Act also originally contained provisions on the protection of personal rights and privacy, stipulated in its Section 8. However, this Section was deleted by the new Personal Data Protection Act (Act No. 101/2000 Coll.), which stipulated that free access to information does not apply to the provision of personal data.

Personal data shall mean any information on the basis of which a data subject may be directly or indirectly identified in particular on the basis of a number, code or one or more factors specific to his/her identity. This protection applies solely to natural persons; data on legal entities are public by their nature and are not subject to protection.

Personal data may be disclosed in two possible ways:

- Making personal data anonymous – which means that the specific data is processed so that it can no longer be linked to a specific subject, i.e. the specific subject cannot be identified on the basis of this data.
- Consent to data processing – the subject concerned signs an declaration in advance, giving his/her assent to his/her personal data processing in a certain matter.

Then what is the practice in personal data disclosure in relation to distribution of funds from the EU Structural Funds? In accordance with the wording of the Personal Data Protection Act, applicants are usually required to issue an advance declaration whereby they give their consent to disclosure of their personal data. Such an approach may be deemed to be both legal and legitimate, as control over public funds and over the use thereof must be considered beneficial for society. As there is no legal claim to subsidies from public funds including EU Structural Funds, it may be concluded that the consent to the processing of

personal data can be a precondition for acceptance of the project application for factual evaluation. To the contrary, failure to provide this consent may be considered to constitute a reason for excluding the project from further evaluation.

Practice

The research was concerned with monitoring of the practice of public administration authorities relating to disclosure of information in relation to the distribution of funds from the EU Structural Funds. The Joint Regional Operational Program and the grant schemes system organized at the NUTS 3 level were chosen. This was based on the fact that they enable more detailed comparison of the practice of the individual authorities compared to the individual JROP projects selected at the NUTS 2 level. The grant schemes selected were concerned with the following JROP measures:

- 1.1. Support of small-scale enterprises in economically weak and structurally affected areas programme
- 1.1. Support of small and media enterprises in economically weak and structurally affected areas programme
- 3.2. Support of social integration in the regions
- 4.1.2. Development of regional and local services for tourism - public institutions
- 4.1.2. Development of regional and local services for tourism (small and media enterprises)
- 4.2.2. Development of regional and local tourist infrastructure

The study examined the practice of the regional authorities in 13 Czech administrative regions, i.e. with exception of the Capital City of Prague, which is not covered under Objective 1 in the 2004 – 2006 programming period:

Central Bohemia Region	Pardubice Region
South Bohemia Region	Vysočina Region
Plzen Region	South Moravia Region
Karlovy Vary Region	Olomouc Region
Usti nad Labem Region	Zlin region
Liberec Region	Moravia-Silesia Region
Hradec Kralove Region	

The purpose of the study concerned with the grant schemes of the individual administrative regions was to determine whether the following information is regularly made public.

- list of supported projects
- list of unsupported projects/list of all projects
- brief project description
- assessor/evaluator comments
- quantitative indicators
- amount of grant
- evaluation points
- description of evaluation system
- names of assessors/evaluators
- contacts to administrators
- orientation in the website
- update of website

What information should optimally be disclosed? It may be argued that, pursuant to the principles of transparency and active publicity of the public administration, it is necessary to publish as much information as possible on the use of public resources and on the recipients of funds. The following information should be available for the general public as well as for successful and unsuccessful applicants for support: which projects were selected and which were not supported, including a brief project description, the reason for exclusion or support (evaluators'/assessors' comments), numbers of points obtained (order of projects) and the cost of the project.

During the study, the research team was surprised by the fact that some regional authorities also published other information. These included the quantitative indicators of the project (in particular, quantitative outputs) as well as the names of the evaluators/assessors (the members of the evaluation or selection committees). If the indicators are only published as supplementary information to the project description, there would be no objections to this practice; however, in this particular case, the indicators replaced the brief description of the project, which is more important for the general public.

The publication of the names of persons making decisions on specific projects is a more disputable fact. This might seem at first glance to be a positive step towards increased transparency and openness of the selection and evaluation processes. On the other hand, this might be a potentially risky practice from viewpoint of corruption. The main argument consists in the fact that the grant schemes (as well as other invitations) are published regularly, sometimes even twice annually. Understandably, the list of people making decisions on specifically defined projects is limited and it can be expected that the same people will also make decisions in the next invitation round. In spite of this potential risk, we appreciated disclosure of the information on the specific evaluators/assessors in our research.

Apart from the information on the completed selection process, access of potential applicants to information was also reviewed. Information should certainly be made available on the public site and can substantially facilitate the search for grant and subsidy opportunities by potential applicants. This applies, for example, to evaluation and selection systems, including a detailed description of the evaluation criteria, names of the responsible administrators and contacts thereto, orientation in websites and regular updating thereof, etc.

The table on the following page contains the summarized collected data and the order of regions according to their openness and the transparency of the selection processes. The data were collected in the period from September 4 to September 8, 2006. As we can see, access to information varies in the Regions. The information on supported projects (published in 12 regions out of the 13 reviewed) and on the amounts of grants (11/13) is most common .

NUTS III. Regions – grant schemes	supported projects	unsupported projects/list of all projects	brief project description	assessor/evaluator comments	indicators	amount of grant	evaluation points	description of evaluation system
Central Bohemia Region	2	2	2	1	0	2	2	2
South Bohemia Region	2	1	0	0	0	0	0	2
Plzen Region	2	2	0	0	0	2	0	2
Karlovy Vary Region	2	2	0	0	0	2	2	2
Usti nad Labem Region	1	1	0	0	0	1	1	2
Liberec Region	2	2	0	1	0	2	2	2
Hradec Kralove Region	2	2	0	0	0	2	0	2
Pardubice Region	0	0	0	0	0	0	0	2
Vysočina Region	2	0	0	0	0	2	0	2
South Moravia Region	2	0	0	0	0	2	0	2
Olomouc Region	2	0	0	0	2	2	0	2
Zlin region	2	0	0	0	0	2	0	2
Moravia-Silesia Region	2	0	0	0	0	2	2	2

NUTS III. Regions – grant schemes	names of evaluators/assessors	contacts to administrators	orientation at website	update of website (range 0-1 pt.)	total	rank
Central Bohemia Region	0	2	2	1	18	1.
South Bohemia Region	0	2	2	1	10	10.-12.
Plzen Region	0	2	2	1	13	3.-5.
Karlovy Vary Region	0	0	1	0	11	6.-9.
Usti nad Labem Region	0	2	2	1	11	6.-9.
Liberec Region	2	2	1	1	17	2.
Hradec Kralove Region	0	0	2	0	10	10.-12.
Pardubice Region	0	2	2	1	7	13
Vysočina Region	0	2	2	1	11	6.-9.
South Moravia Region	0	1	2	1	10	10.-12.
Olomouc Region	0	2	2	1	13	3.-5.
Zlin region	0	2	2	1	11	6.-9.
Moravia-Silesia Region	0	2	2	1	13	3.-5.

notes: 0 - no information, 1 - partial information, e.g. only for some grant schemes, 2 - sufficient information

Approximately one half of the regions (7/13) publish lists of all projects, i.e. including the projects of unsuccessful applicants. In contrast, shortcomings were found in relation to publishing information that may be considered to be important, i.e. brief project descriptions (1/13), evaluators'/assessors' comments (2/13) and number of points awarded (5/13). Regular publishing of this information would contribute to a higher level of transparency of the selection proceedings and would in no way represent a breach of the rules governing the protection of personal data.

The other part of the assessed data, i.e. the access to information for potential applicants, can be evaluated as quite satisfactory. The detailed evaluation criteria were stated (13/13), as well as the names of administrators, including their telephone numbers and e-mail addresses (11/13) for each call for a proposal, and the sections are mostly updated (11/13).

The study led to the question as to whether the whole projects should be published, which was not a subject of the examination. This question followed from the practice and the procedure, unusual within the conditions in the Czech Republic, of the Department for EU Information of the Office of the Government, which redistributes funds from the State budget with the aim to provide information on certain aspects of the European Union and the relations following for the Czech Republic and its citizens from membership in the EU. On its websites, the Office publishes not only the names of supported projects, but also the full content thereof, including a detailed description of events, indicators, timescale, personnel provision, etc. In addition, the sites contain information on members of the selection committees.

Can the entire project documentation be published? Are trade secrets or copyrights violated by this procedure?

First, we shall discuss this aspect from the viewpoint of trade secrets and the possible violation thereof. A trade secret is provided for by Section 17 of the Commercial Code and must comply with the following characteristics:

- it contains information of technical or commercial nature relating to a business;
- it has a certain potential value;
- the information is not generally accessible;
- the entrepreneur wishes to keep the information secret and actually does so.

As follows from the above that only the trade secrets of business entities that are subject to the Commercial Code are protected. This protection thus usually does not apply to other

entities applying for support from EU Structural Funds (municipalities, NGOs). The fact that an entrepreneur keeps the information secret and does not publish it represents an important feature of a trade secret. Therefore, the argument that the information represents trade secret may not be used in any potential dispute with a public administration body if the information has been previously disclosed, e.g. in the project application. Stating this information in the project may be considered as disclosure thereof or, more precisely, as non-protection thereof, and thus the information ceases to have the status of a trade secret. Moreover, Section 9 of the Act on Free Access to Information explicitly states in its second paragraph that "in the provision of information related to the use of public funds, the provision of any information on the amount and recipients of monies from the public budgets or on the disposal of assets of such entities is not considered as a breach of trade secrecy."

For the purpose of prevention of legal disputes it would be advisable that the call for proposal documents and the subsequent agreement on the provision of a grant explicitly state that the information included in the project application is deemed to be disclosed and that the protection of a trade secret does not apply to such information.

On the other hand, the publication of the entire project documentation may be assessed from the viewpoint of copyrights. A relatively wide definition of a copyright is stipulated in Section 2 of the Copyright Act and includes a literary work or other work of art or a scientific work as well as a computer program and creation of a database. The work is protected by a copyright provided that it is the author's own intellectual creation. This precondition does not exclude a project application prepared by any entity for the purpose of the provision of financial support from the EU Structural Funds from copyright protection. A project may be perceived in many ways; in this case, we consider that this corresponds to its systemic and logically interconnected structure expressed in a detailed structured literary form or through a particular project management tool (e.g. logical framework). In any case, the resolution of a certain situation, defined by the relevant authority, is the author's own intellectual creation and this creation is protected by a copyright. In other words, this means that the organization receiving project applications is not entitled to publish the entire content thereof without the author's consent. For the purpose of the use of funds from the Structural Funds, it may be recommended that the call for proposal documentation as well as the agreement on the provision of a grant include the provision whereby the author gives his consent to the publication of the work (project documentation) for the purpose of transparency and openness of the public administration.

Conclusions

Openness and transparency of the public administration need to be considered as a precondition for the good functioning of democracy and the public administration pursuant to good governance standards. Citizens have the right to access to the largest possible amount of information relating to the use of public budgets and implementation of certain policies. The publication of information above and beyond the framework of obligations stipulated by the Act on Free Access to Information may be seen as a sign of an open and amicable public administration and such an approach can be recommended.

On the other hand, the public administration bodies must fully respect the legal restrictions aimed at the protection of personal data, trade secrets and the intellectual creations of individuals when disclosing information. When distributing funds from the Structural Funds, the relevant authorities should obtain the prior consent of the applicant to disclosure of individual data. The consent to publication of personal data is relevant only if the application for support is presented by natural persons. The issuer of a specific invitation shall notify the applicants of the fact that the information included in the application is not subject to the provisions on trade secrets and that it may be disclosed to prevent any possible legal suits. Finally, if a public administration authority seeks the maximum transparency towards the general public and wishes to publish the entire project documentation, it must obtain consent to publication of such work protected by the relevant provisions of the Copyright Act.

The public administration bodies should adopt a certain minimum standard of publication of the information on supported projects as these requirements need not be fully harmonized and it is not necessary to require exactly the same information from all the public administration authorities. Such minimum openness and transparency standards include the list of supported and unsupported projects, a brief project description, the reason for exclusion or support (including summary evaluators'/assessors' comments), the number of points awarded (order of the projects) and the amount of project. The study revealed that, in practice, disclosure of such information is not at all common.

Sources and References:

- Act No. 16/1999 Coll., on free access to information, as amended
- Act No. 101/2000 Coll., on the protection of personal data, as amended
- Charter of Fundamental Rights and Freedoms promulgated by resolution of the Czech National Council No. 2/1993 Coll.
- Act No. 513/1991 Coll., Commercial Code, as amended
- Act No. 121/2000 Coll., Copyright Act, as amended
- Miloš Tuháček: Possibility of Access to Information on Projects Supported from the EU Structural Funds, Transparency International, Prague 2006
- Oldřich Kužílek, Michael Žantovský: Freedom of Information – Free Access to Information in the Czech Legislation, 2002
- Mgr. František Korbel Ph.D.: Free Access to Information Pursuant to Act No. 106/1999 Coll. - Selected Issues, Brno 2005